IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.265 OF 1989

Kantabai Anandrao Solaskar
since deceased by her legal
heir and representative:

Bhikutai Anandrao Solaskar,
aged 40 years, R/o At Solashi,
Taluka Koregaon,
District Satara. .. **Appellant**
(Original Plaintiff)

..**versus**.

Kantilal Mansing Solaskar,
since deceased through his
legal heirs:-

1(a) Smt. Laxmibai Mansing
Solaskar,

(b) Smt. Suman Kantilal
Solaskar,

(c) Deepak Kantilal Solaskar,

(d) Dhananjay Kantilal
Solaskar,

(e) Uma Kantilal Solaskar,

All residents of Solashi,

Taluka Koregaon,
Dist. Satara. .. **Respondent**
(Original Defendant)

Mr. Niranjan Shimpi, Advocate, for the Appellant.
None for the Respondent.

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Coram : K.J. Rohee, J.

Reserved on : April 20, 2006.

Pronounced on : April 25, 2006.

Judgment

The appellant is the original plaintiff who has challenged the judgment of 3rd Additional District Judge, Satara allowing Regular Civil Appeal No. 219/1985 on 19.10.1988 by reversing the judgment and decree passed by the Civil Judge, Junior Division, Koregaon, in Regular Civil Suit No. 28/1979 decreeing the suit for redemption on 10.7.1985.

2. It is not disputed that Anandrao Narsu Solaskar (the husband of the plaintiff) was the owner of Gat No. 561-A, area 54 R. , land revenue Rs. 13.93 ps situated at village Solashi, taluka Koregaon, district Satara. He had three wives viz. Kaushalyabai, Kantabai (the plaintiff) and Ambubai. Out of them Kaushalyabai died in 1978-79. Bhikutai (PW1) is the daughter of Kantabai (the plaintiff).

3. According to the appellant/original plaintiff, her husband Anandrao had mortgaged the suit land with respondent/original defendant for Rs.1400/- on 20.6.1956. The possession of the land was delivered to the respondent. Anandrao died in 1961. Hence the transaction remained incomplete. After the death of her husband the appellant asked the respondent several times to redeem the mortgage by accepting the amount of loan. However, the respondent avoided to do so. Hence on 26.10.1978, the appellant issued a notice to the respondent. The respondent intentionally avoided to receive the notice. Hence the appellant brought suit for redemption.

4. The respondent resisted the suit by filing his written statement. According to him the suit itself is not tenable because all the legal heirs of deceased Anandrao Solaskar have not been joined in the suit. The suit is, therefore, liable to be dismissed.

5. It was contended by the respondent inter alia that it was not a mortgage by conditional sale, but sale with a condition to repurchase within five years. Time was the essence of the said contract. However, the seller failed to repay the loan within time and hence the sale has become absolute. The respondent is cultivating his land as owner thereof.

6. The appellant examined her daughter Bhikutai whereas the respondent examined himself, his mother

Laxmibai and one more witness. It seems that the appellant produced the envelop containing notice issued by her to the respondent. However, the important document viz. mortgage deed on the basis of which the suit was instituted was not brought on record.

7. The trial Court held that the suit property was mortgaged with the respondent; that the appellant was ready and willing to perform her part of the contract for redeeming the property; that she is entitled for redemption and for inquiry into the future mesne profits. The trial Court accordingly decreed the suit though no direction for drawing preliminary decree was given.

8. The appellate Court held that the transaction in question was a sale with condition to repurchase and not a mortgage by conditional sale. It held that the suit was not within time. However, no reasons were assigned for this finding. The appellate Court further held that the suit is not tenable as all the persons interested in the mortgage have not been joined. In the result, the appellate Court allowed the appeal and dismissed the suit. The said judgment is under challenge.

9. I have heard Mr. Niranjan Shimpi, Advocate, for the appellant. Nobody appeared for the respondent.

10. The appeal was admitted only on the substantial question of law as to whether the transaction dated 20.6.1956 is mortgage with conditional sale or sale out and out with

condition to repurchase.

11. After going through the pleadings of the parties and the evidence on record, I am of the opinion that another substantial question of law is whether the suit itself is tenable for want of necessary parties.

12. It has come in evidence that Anandrao Solaskar (the mortgagor) was having three wives viz. Kaushalyabai, Kantabai and Ambubai. Ambubai deserted Anandrao and Kaushalyabai died in 1978-79. Bhikutai is the daughter of Anandrao from Kantabai. Thus after the death of Anandrao, Ambubai, Kantabai and Kantabai's daughter Bhikutai are the legal heirs to him. Being his legal heirs, they have an interest in the right of redemption.

13. Rule 1 of Order 34 provides that all the persons having an interest either in the mortgaged security or in the right of redemption shall be joined as parties to any suit relating to mortgage. Thus in the present case, Ambubai, Kantabai and her daughter Bhikutai are necessary parties to the suit. The suit has been brought only by Kantabai. She has not joined Ambubai and Bhikutai as parties to the suit. In their absence, the suit itself becomes untenable and on this count alone, the suit deserves to be dismissed.

14. Even if it is presumed that the suit is tenable in the absence of the persons interested in redemption, let us see whether the suit can be decreed on merits. Section 58 of the Transfer of Property Act defines mortgage as the transfer of

an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. In the present case the plaint nowhere discloses that the document dated 20.6.1956 was executed for the purpose of securing the payment of money advanced by way of loan.

15. **A. I. R. 1988 Supreme Court 1074 (Smt. Indira Kaur and others .vs. Shri Shero Lal Kapoor** and **(2005) 6 Supreme Court Cases 243 (Umabai and another .vs. Nilkanth Dhondiba Chavan and another)** cited by the learned counsel for the appellant are not at all helpful to the case of the appellant. The first appellate Court found that the photo copy of the original document (Exh.30) does not give the relationship of debtor and creditor nor stipulation of payment of interest nor does it disclose that the loan was advanced by way of security for the loan. Thus the ingredients required in the document to be a mortgage by conditional sale are totally absent. The first appellate Court, therefore, held that the transaction was a sale with condition to repurchase. I fully endorse the finding given by the first appellate Court. In the result, there is no merit in the appeal and the same deserves to be dismissed. Hence the order:

O R D E R

The appeal is dismissed with costs.

(K. J. Rohee, J.)

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